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RESPONDENT'S BRIEF

In Opposition to Petition for Review on Writ of Certiorari

SUPREME COURT
OF THE
UNITED STATES

EVELYN C. GARDNER,

Petitioner,

versus

PANAMA RAILROAD COMPANY,

Respondent.

On petition for review on writ of certiorari of the decision of the Court of Appeals for the Fifth Circuit in appeal No. 13,259, in Admiralty, 185 Fed: 2d 730 (C. A. 5th C. 1950).

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR REVIEW ON WRIT OF CERTIORARI

Official Report of Opinion of Which Review is Sought

The opinion of the Court of Appeals for the Fifth Circuit in the appeal of *Evelyn C. Gardner*, Appellant vs. *Panama Railroad Company*, Appellee, No. 13,259, in admiralty, review of which Petitioner-Appellant has requested by petition for review on writ of certiorari, is reported in *Gardner* vs. *Panama R. Co.*, 185 Fed. 2d 730 (C. A. 5th C. 1950) [R. p. 45].

Ground on Which Petitioner Seeks to Obtain Review on Writ of Certiorari

As a preliminary observation, it is noted that Petitioner makes no reference to any "statutory provision believed to sustain the jurisdiction" of this Court, as would appear to be required by paragraph 2 of Rule 38 and paragraph 1 of Rule 12 of the Supreme Court Rules.

The sole ground urged by Petitioner as a sufficient reason for the granting of its petition for writ of certiorari is its allegation that the decision of the Court of Appeals for the Fifth Circuit in the case at bar is in conflict with the rule of law set forth in *Lincoln vs. Cunard S. S. Co.*, 221 Fed. 622 (C. C. A. 2d 1915) [Petition, p. 4]. Petitioner does not contend that the decision in the case at bar is in conflict with applicable decisions of the Supreme Court.

Statement of the Case (Amplified)

By way of amplifying Petitioner's statement of the case, it is desired to place before the Court the fact that on the appeal to the Court of Appeals for the Fifth Circuit, Respondent (Appellee there) relied for an affirmance of the judgment of the United States District Court for the District of the Canal Zone [R. p. 34], dismissing the libel, not only upon the grounds stated in said judgment, to wit, that the suit is barred by laches, but also on the ground that the District Court lacks jurisdiction over the subject matter of the suit. [R. pp. 6, 40]. Respondent in its cross-assignment of errors on appeal to the Court of Appeals specifically assigned as error the order of the District Court dated February

15, 1950 [R. p. 20], overruling Respondent's motion to dismiss for lack of jurisdiction over the subject matter, on the ground that the Court's order was erroneous as a matter of law [R. pp. 40, 41]. The Court of Appeals, being in agreement with the opinion of the District Judge that laches barred the suit, found it unnecessary to determine whether the suit should have been dismissed for lack of jurisdiction over the subject matter. *Gardner vs. Panama R. Co.*, 185 Fed. 2d 730 (C. A. 5th C. 1950) [R. p. 45]. Accordingly, if the petition for writ of certiorari were to be granted, Respondent would urge such additional ground, i.e. lack of jurisdiction over the subject matter, as an alternative reason for sustaining the decision of the Court of Appeals affirming the judgment of the District Court dismissing the libel.

Argument

Summary: The substance of Respondent's argument in opposition to the granting of the petition for review on writ of certiorari is that Petitioner's allegation that the decision of the Court of Appeals is in conflict with the decision of the Court of Appeals for the Second Circuit in the case of *Lincoln vs. Cunard S. S. Co.*, 221 Fed. 662 (C. C. A. 2d 1915), which, as aforesaid, is the sole ground urged by Petitioner as warranting this Court in granting the writ, is clearly erroneous. It is respectfully submitted that Petitioner's erroneous conclusion stems from: (a) a misinterpretation of what was held by the Court of Appeals and by the District Court in the case at bar; (b) a misinterpretation of the *Lincoln* case and a failure to fit that case and the case at bar within the applicable general rule respecting the issue in dispute; and (c) an inexcusable failure to

consider and treat the more recent decisions of the Court of Appeals for the Second Circuit, which are considerably more directly pertinent and germane to the point at issue than is *Lincoln*, several of which decisions were cited and relied upon by Respondent, both in the District Court and on appeal to the Court of Appeals. Such decisions, far from indicating a conflict with the decisions of the Second Circuit, clearly indicate that such decisions on the point at issue are entirely consistent with and in harmony with the decision of the Court of Appeals in the case at bar.

The sole ground urged by Petitioner as a sufficient reason for the granting of its petition for review on writ of certiorari is its assertion that the decision of the Court of Appeals in the case at bar is in conflict with the rule of law set forth in *Lincoln vs. Cunard S. S. Co.*, 221 Fed, 622 (C. C. A. 2d 1915), which, by implication, is presumably urged as representing the law of the Second Circuit on the point at issue.

a. What the Court of Appeals and the District Court Held

To fairly and accurately analyze Petitioner's contention that the rule of law announced in the decision of the Court of Appeals is in conflict with the pertinent decisions of the Court of Appeals for the Second Circuit, it is necessary of course to examine preliminarily into what the Court of Appeals actually held in the case at bar. Petitioner asserts that the Court of Appeals " * * * has affirmed the rule that where a litigant has a choice of suing at law or in admiralty for the same cause of action, should he choose to

sue in admiralty after the analogous period of the running of the statute of limitations, the action will be barred by laches, regardless of diligence or any other factors in his favor." [Petition, p. 4.] Petitioner's brief reflects the same view of what the holding of the Court of Appeals was. [Petitioner's brief, p. 10.] Petitioner refers to no language of either the Court of Appeals or of the District Court which would tend to confirm its stated view of what the holding of the Court of Appeals was. This first portion of Respondent's argument will attempt to show in what respects Petitioner's view of the holding is incorrect and to state what the Court of Appeals actually held.

It is submitted that Petitioner's stated view of the holding of the Court of Appeals in the case at bar, to the extent that it suggests by implication that the Court held that the District Court was *bound* to dismiss the suit brought in admiralty because the libel was filed after expiration of the one-year period during which an action at law could have been brought for the same injuries, without regard to whether Petitioner (Libelant in the District Court) could show exceptional circumstances excusing its delay and rebutting the presumption of injury to Respondent resulting from such delay, is demonstrably erroneous.

The issue respecting laches which was before the Court of Appeals was the simple question of whether the District Court had abused its discretion in dismissing the libel on the ground of laches. This follows from two well-established principles of law:

First, the well-established doctrine, conceded by Libelant below, that the question of laches is addressed to the sound discretion of the trial court and that such court's decision on that issue will not be disturbed on

appeal unless so clearly wrong as to constitute abuse of discretion. *The Kermit. Lamborn et al vs. American Ship and Navigation Corp. et al*, 76 Fed. 2d 363 (C. C. A. 9th 1935.) See also *The Kanto Maru., Inger A/S, a corp. vs. Harada Kisen Kabushiki Kaisha*, 112 Fed. 2d 564 (C. C. A. 9th 1940); *Carter Shipping Co. vs. Bowring, Jones & Tidy*, 281 U. S. 515, 50 S. Ct. 400, 74 L. Ed. 1008 (1930); *The Belgenland*, 114 U. S. 355, 5 S. Ct. 860, 866, 29 L. Ed. 152 (1885); and

Second, the proposition that where an issue lies within the discretion of the trial court, it of course follows that it is not for the appellate court to weigh the conflicting considerations which the trial court had for consideration, or to determine for itself how it would rule on such question, but only to determine whether the trial court's decision was so palpably erroneous that it amounted to an abuse of discretion. See *The Kanto Maru*, cited above.

The Court of Appeals affirmed the judgment of the District Court, which had dismissed the libel on the ground that it had become barred by laches, without extended discussion. *Gardner vs. Panama R. Co.*, 185 F. 2d 730 (C. A. 5th C. 1950) [R. pp. 46, 47]. The Appellate Court said, *inter alia*:

> "The district judge, on the authority of McGrath v. Panama Railroad Co., 5 Cir., 298 F. 303, sustained the defense and dismissed the libel, and libellant is here claiming that it was error to do so.
>
> * * * * *
>
> "In agreement as we are with the opinion of the district judge that laches has barred the action, we find it unnecessary to determine whether the suit should have been dismissed on the first ground urged by respondent that libellant had no cause of action in admiralty because the Tort Claims Act furnished the exclusive remedy."

Petitioner concedes that the case principally relied upon as controlling precedent by both the District Court and the Court of Appeals was *McGrath vs. Panama R. Co.*, 298 Fed. 303 (C. C. A. 5th 1924) [Petitioner's Brief, p. 13]. In that case, the Libelant, one Anna McGrath, sought to recover damages alleged by her to have been caused by injuries received by her while a passenger on one of this Respondent's steamships, while making a voyage between New York City and the Canal Zone. The libel was dismissed by the then judge of said District Court on the ground of laches. The libel had been filed 40 days after the expiration of a year from the date of the injuries. On appeal to the Court of Appeals for the Fifth Circuit, the decision of the District Court was affirmed, the decision of the Court of Appeals on that point reading as follows [298 Fed. 303]:

> "The applicable statute of limitations for actions at common law for personal injuries in the Canal Zone is one year from the date of the injury. The limitation of three years, which obtains under the Code of Colombia, was superseded by the repealing clause of the legislation and executive orders, which put into effect the Canal Zone Code of Civil Procedure. Courts of admiralty are not, however, bound by common-law limitations, but adopt them by analogy, unless equitable reasons exist for not doing so. In the case of a libel in personam for the recovery of damages for personal injuries, the reason for following the limitations of the common law in courts of admiralty is emphasized by reason of there being preserved to the libelant in such a case the right to sue at common law, as well as in admiralty. In the event the libelant sued at common law, the statute of limitations would bar a recovery. It would be inconsistent to permit him to sue in admiralty with the same effect as at common law (as is true in the case of a libel in

personam), after his right to sue at common law had become barred."

In *McGrath*, libelant urged that there had been no injury to respondent from the delay in bringing suit. The Court of Appeals held on that point as follows [298 Fed. at 304]:

> "The appellant suggests that no injury is shown to have been done to the appellee by the delay in filing the libel. Injury is presumed from the statutory period of limitation in common-law actions, and, when equity adopts the statutory period, it adopts along with it the presumption of injury, until the contrary is shown. * * * ."

On the above facts, conditions, and considerations, the Court of Appeals in the *McGrath* case affirmed the lower court's dismissal of the action on the ground that libelant's laches barred the suit. *McGrath* did not hold that an admiralty court is *bound* to dismiss a suit for laches if brought after expiration of the one-year period during which an action at law could have been brought for the same injuries, without regard to whether libelant could show special circumstances excusing his delay and rebutting the presumption of injury to respondent because of such delay [Petitioner in effect concedes this at p. 13 of its Brief]; rather, the court in that case, after full consideratio of libelant's evidence bearing on the questions of excuse and of rebutting of the presumption of injury to respondent resulting from delay, held that on the facts and circumstances of that case, the trial court had not abused its discretion in dismissing the case because of laches, particularly since, in the case of a libel in personam for the recovery of damages for personal injuries, the reason for following by analogy the limitations applicable at law in the courts of admiralty is emphasized by reason of there being preserved to the libelant in such a case the right to sue at common law, as well as in admiralty, so that

it would be inconsistent to permit him to sue in admiralty, with the same effect as at common law, after his right to sue at common law had become barred. *McGrath* did not hold that *no* exceptional circumstances could establish a satisfactory excuse for delay or rebut the presumption of injury to respondent resulting from delay, but only, that in this class of cases, the character of any alleged special circumstances would have to be more exceptional, and the proof required to sustain such showing would have to be more persuasive in order to show such excuse and rebut such presumption.

The District Court and the Court of Appeals in the case at bar having adopted the *ratio decidendi* of the *McGrath* case, it must be considered that the decisions of the District Court and of the Court of Appeals were founded on and reached by the same analysis as governs the decision in *McGrath;* in other words, that, in the case at bar, the District Court, in the exercise of its admitted discretion, and after a full consideration of all evidence Libelant below was able to produce which would tend to indicate exceptional circumstances justifying the delay and rebutting the presumption of injury to Respondent from delay, concluded from all the facts and circumstances that there was not made out a case strong enough to excuse the delay or rebut the presumption of injury to Respondent resulting from delay, and accordingly dismissed the libel on the ground of laches, particularly since this case, like the *McGrath* case, was the case of a libel in personam for the recovery of damages for personal injuries, in which the reason for following the limitations of the common law in courts of admiralty is particularly strong by reason of the fact that there is preserved to the libelant in such a case, the right to sue at common law as well as in admiralty, so that it would be inconsistent to permit him to sue in admiralty, with the same effect as at

common law, after his right to sue at common law had been barred. The Court of Appeals, following the rationale of its earlier decision in *McGrath*, merely held that the District Court had not abused its discretion in dismissing the libel on the ground that it was barred by laches. In this decision, as in the *McGrath* case, the Court of Appeals did not hold that *no* type of special circumstance would justify a court in departing from the analogy of the statute of limitations at law, but only that, under the circumstances of this case, the District Court did not abuse its discretion in holding that no such departure was warranted.

In the succeeding two portions of this brief Respondent will attempt to show that the decisions in *McGrath* and in the case at bar are in entire harmony with the pertinent decisions of the Court of Appeals for the Second Circuit.

b. *Lincoln vs. Cunard S. S. Co.* (2d Circuit) Applied Same Rule of Law as was Applied in Case at Bar

Petitioner asserts that the decision in the case at bar is in conflict with *Lincoln vs. Cunard S. S. Co.*, 221 Fed. 622 (C. C. A. 2d 1915), by implication representing the holding in that case as constituting the law of the Court of Appeals for the Second Circuit on the point in question. Respondent will attempt to show in this second portion of its brief that *Lincoln* is entirely in accord with the decision in the case at bar.

In the *Lincoln* case Libelant, a seaman (bargemaster), brought suit for injuries sustained by him as a result of a discharge of steam from the side of a vessel. The libel was served four years, seven months and 15 days after the cause of action arose; the analogous statute of limitations at law was three years. Another statutory

provision which the court found pertinent, sec. 405 of the Code Civ. Proc. N. Y., was quoted by the court as follows [221 Fed. at 624]:

> "If an action is commenced within the time limited therefor, and a judgment therein is reversed on appeal, without awarding a new trial, or the action is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits; that plaintiff, or, if he dies, and the cause of action survives, his representative, may commence a new action for the same cause, after the expiration of the time so limited, and within one year after such a reversal or termination."

The court in *Lincoln* stated the general rule respecting the analogy of common law limitations in determining the question of laches, and framed the issue involved in that case, in the following language [221 Fed. at 624]:

> "The rule in courts of admiralty is that, where there is nothing exceptional in the case, the court will govern itself by the analogies of the common-law limitations. Southard v. Brady (C. C.) 36 Fed. 560; Davis v. Smokeless Fuel Co., 196 Fed. 753, 116 C. C. A. 381. The libel having been filed more than a year and a half after the period fixed by the statute had expired, the question presented is whether the circumstances are *so exceptional* as to justify the court in holding that there was no such laches as to her relief. The respondent contends that there is nothing exceptional in the facts, and that libelant's laches has been such as to put the case out of court." [emphasis added]

The chronological development of that case was stated by the court to have been as follows [221 Fed. at 624]:

> "It appears that within two years after the accident an action at law was begun in the United States Circuit Court of the Southern District upon the assumption that Fill was a citizen of New

Jersey and that a diversity of citizenship existed. It was supposed that Fill had become naturalized. This was found to have been error, and the common-law action was dismissed, without any investigation of the merits, on the ground that both plaintiff and defendant were citizens of Great Britain. The dismissal of the action was by the judgment of the Court expressly stated to be without prejudice to the plaintiff's right to proceed in admiralty. The action was submitted by stipulation of the facts on the question of jurisdiction and citizenship only, and was decided by the court without a jury on April 22, 1913. The libel was filed 14 days after the judgment of dismissal in the common-law case. *In substance this was merely a transfer of the controversy from the common-law to the admiralty side of the same court;* the Circuit Court having merged in the District Court January 1, 1912." [emphasis added]

It is submitted that the court's characterization of that case as being "in substance * * * merely a transfer of the controversy from the common-law to the admiralty side of the same court" is significant, when contrasted with the circumstances of the case at bar, where the action at law brought by Petitioner immediately prior to the filing of the present libel against this Respondent was brought against a different defendant, the United States, under the Tort Claims Act.

On the factual circumstances quoted above, the court in the *Lincoln* case made the following conclusion of law [221 Fed. at 624, 625]:

> "Without going further into the matter, *the conclusion we have reached is that the circumstances may be regarded as exceptional*, and that libelant's conduct does not amount to laches, *especially in view of section 405, supra.*" [emphasis added]

The court in *Lincoln* was doubtless also influenced by the further consideration that the libelant in that case was a seaman (bargemaster) and was therefore disposed

to consider his case exceptional, under the well established rule, still in force and effect, that seamen, who historically were often ignorant of their rights, are the wards of admiralty. *Johnson vs. United States*, 186 F. 2d 120, 125 (C. A. 4th C. 1950).

The question of the presumption of injury to respondent does not appear to have been urged in that case or treated by the court.

Respondent respectfully submits that there is nothing in *Lincoln* at variance with the decision in the case at bar. *Lincoln* stated and applied the same general rule respecting the analogy of the statute of limitations at law as was urged and applied in the case at bar; indeed, one of the decisions relied upon in *Lincoln* for the proposition that a court of admiralty, where there is nothing exceptional in the case, will govern itself by the analogy of the applicable limitations at law, namely, *Southard vs. Brady* (cited in the quoted material above), was relied upon by this Respondent in the case at bar. The court in *Lincoln* expressly found that " * * * the circumstances may be regarded as exceptional, and that Libelant's conduct does not amount to laches, especially in view of section 405, supra." Even putting aside the effect of the special statutory provision by which the court in *Lincoln* was expressly influenced, it is submitted as too obvious to require elaboration that the fact that one court reaches the conclusion that the plea of laches is not a bar, after application of a particular set of facts to a general rule of law, whereas another court reaches the conclusion that a suit is barred by laches, after application of the particular facts there involved to the same general rule of law, does not put such *decisions* in conflict. The results differ only because the facts differ. The situation would be different, of course, if the courts had stated, and applied, *different rules of law.*

And, as developed hereinbefore, the scope of review of the Court of Appeals did not extend to reviewing the facts to ascertain whether it would have reached the same conclusion as that reached by the District Court, but merely to determine on the record, as the Court did, whether there was sufficient evidence to support the decision of the District Court as against the contention on appeal that the District Court had abused its discretion.

To summarize this portion of Respondent's argument, its position, briefly, is that there is no conflict between the *Lincoln* case and the decision of the Court of Appeals in the case at bar inasmuch as: (a) both decisions recognized and applied the same rules of law respecting the analogy of the common law limitations in passing upon the question of laches; (b) the facts of each case justified the particular conclusions reached therein; and (c) on the facts the Court of Appeals in the case at bar was correct in ruling in effect that the District Court had not abused its discretion in dismissing the case on the ground that it was barred by laches.

c. The Rule of Law of the Second Circuit is Substantially the Same as That Applied in the Case at Bar

As representing the rule of the Court of Appeals for the Second Circuit on the issue of laches involved in the case at bar, Petitioner cites only *Lincoln vs. Cunard S. S. Co.*, cited above. Petitioner chooses to ignore a number of available, more recent decisions of the Second Circuit on the issue at bar, several of which were relied upon by this Respondent both in the District Court and on appeal to the Court of Appeals, and which, it is submitted, demonstrate unmistakably that the

rule of law respecting the analogy of the statute of limitations in passing upon the defense of laches in admiralty in the Second Circuit is substantially the same rule as that applied in the Fifth Circuit, and, more specifically, that which was applied in the case at bar.

There follows an analysis of the principal legal principles involved in the case at bar, and a comparison of the holdings of the Court of Appeals for the Second Circuit respecting such principles of law:

As aforesaid, Petitioner has not contested in this case that the question of whether or not a suit in admiralty is barred by laches lies within the sound discretion of the admiralty court. In the exercise of such discretion the courts are guided by certain well established principles. One of these is that, as a general rule, an admiralty court will adopt by analogy the statute of limitations of the State in which the suit in admiralty is brought, in the absence of exceptional circumstances justifying or excusing the delay and rebutting the presumption of damages to respondent resulting from such delay. *Hughes vs. Roosevelt*, 107 Fed. 2d 901 (C. C. A. 2d 1939); *Frame vs. City of New York*, 34 Fed. Supp. 194 (DC SD NY 1940); *Pope vs. McGrady Rodgers Co.*, 70 Fed. Supp. 780 (DC Penn. 1947), affirmed 164 Fed. 2d 591 (C. C. A. 3d 1947); *McGrath vs. Panama R. Co.*, 298 Fed. 303 (C. C. A. 5th 1924); *Marshall vs. International Mercantile Marine Co.*, 39 Fed. 2d 551 (C. C. A. 2d 1930); *Westfall Larson & Co. vs. Allman-Hubble Tug Boat Co.*, 73 Fed. 2d 200 (C. C. A. 9th 1934); *Southard vs. Brady*, 36 Fed. 560 (CC NY); *Scull vs. Raymond*, 18 Fed. 547 (DC SD NY); *Davis vs. Smokeless Fuel Co.*, 182 Fed. 1004 (D. C. N. Y. 1910) [affirmed, *Davis vs. Smokeless Fuel Co.*, 196 Fed. 753 (C. C. A. 2d 1912)]. The cited cases are those which were relied upon by this Respondent on appeal

to the Court of Appeals in the case at bar; it will be noted that all but three of them arose in the Second Circuit. The court in *Marshall* (a Second Circuit case) discussed and adopted the analysis of *McGrath vs. Panama R. Co.* Likewise, the court in *Westfall Larson & Co. et al* (Ninth Circuit) cited the *McGrath* case, among others, in declaring the aforementioned general rule, referring thereto in the following language [73 Fed. 2d at 203]:

> "The rule was lucidly expounded by Judge Grubb in McGrath v. Panama R. Co. (C. C. A. 5) 298 F. 303, 304:
>
> 'Courts of admiralty are not, however, bound by common-law limitations, but adopt them by analogy, unless equitable reasons exist for not doing so. * * * '"

It is further noteworthy that among the other cases cited in support of this general rule by the court in *Westfall Larson & Co.* was *Lincoln vs. Cunard S. S. Co.* (Second Circuit), which Petitioner has asserted is in conflict with the case at bar. The court in *Westfall Larson & Co.* referred to the *Lincoln* case in the following terms [73 Fed. 2d at 203]:

> "Again, in Lincoln v. Cunard S. S. Co. (C. C. A. 2) 221 F. 622, 624, we find the following language:
>
> 'The rule in courts of admiralty is that, where there is nothing exceptional in the case, the court will govern itself by the analogies of the common-law limitations.'"

It is submitted that it is clearly apparent from the foregoing authorities that the decisions of the Court of Appeals for the Second Circuit (as well as those of the Court of Appeals for the Ninth Circuit) are in accord with the decisions of the Court of Appeals for the Fifth Circuit, and, more particularly, with the decision of

the Court of Appeals in the case at bar, on the fundamental legal principle involved, namely, that an admiralty court in passing upon the issue of laches will adopt by analogy the analogous statute of limitations at law, except when there are exceptional circumstances present in the particular case which warrant a departure therefrom.

What particular circumstances will move a court in its discretion to depart from the analogy of the analogous statute of limitations at law can of course not be definitively stated inasmuch as each such decision necessarily depends upon the particular facts and circumstances of each case.

However, there is persuasive authority that in a libel in personam for personal injuries, such as the case at bar, particularly strong reasons exist for following the limitation at law by analogy. In such cases, a court sitting in admiralty will be less likely to depart from the analogy of the limitation at law because, since libelant has a right to sue at law, as well as in admiralty, it would be inconsistent to permit a libelant to sue in admiralty with the same effect as at law, after his right to sue at law is barred. *McGrath vs. Panama R. Co.*, 298 Fed. 303 (C. C. A. 5th 1924); *Pope vs. McGrady Rodgers Co.*, 70 Fed. Supp. 780 (D. C. Penn. 1947), affirmed 164 Fed. 2d 591 (C. C. A. 3d 1947); *Marshall vs. International Mercantile Marine Co.*, 39 Fed. 2d 551 (C. C. A. 2d 1930); *Westfall Larson & Co. vs. Allman-Hubble Tug Boat Co.*, 73 Fed. 2d 200, 203 (C. C. A. 9th 1934). Significantly, the court in *Marshall*, a Second Circuit case, analyzed and adopted expressly the rationale of the *McGrath* case, on the above point, stating as follows [39 Fed. 2d at 552]:

> " * * * In McGrath v. Panama R. R. Co., 298 F. 303 (C. C. A. 5), * * * the court emphasized the inconsistency of permitting a plaintiff,

who may sue either in a common-law court or a court of admiralty, to maintain his action in the latter court after his right to sue in the former has been lost by delay. It also emphasized that detriment to the adverse party is presumed from delay for the statutory period unless the contrary be shown."

The above principle amounts to no more than a requirement by the courts, in a case involving a claim for personal injury in which a remedy at common law also existed, that there be a *stronger, more persuasive,* showing of special circumstances before an admiralty court will depart from the analogy of the statute of limitations applicable at law. In other words, stronger special circumstances must be proved showing Libelant's excuse for delay and rebutting the presumption of injury to respondent which results from delay. On this point, again, then, the Second Circuit is expressly in accord with the holding in the Fifth Circuit in the case at bar. On the appeal in the case at bar, as aforesaid, it was not for the Court of Appeals to ascertain on the particular facts whether such facts justified a departure from the analogy of the statute of limitations applicable at law, but merely to determine whether the District Court, in ruling that under the particular facts and circumstances the Libelant had not shown facts sufficient to show excuse, was clearly guilty of an abuse of discretion.

Further, the rule of law of the Court of Appeals for the Second Circuit, in a case such as the case at bar, is in accord with the decisions of the Court of Appeals for the Fifth Circuit in holding that injury to respondent is presumed from delay in filing the libel. *McGrath vs. Panama R. Co.*, 298 Fed. 303 (C. C. A. 5th 1924); *Marshall vs. International Mercantile Marine Co.*, 39 Fed. 2d 551, 552 (C. C. A. 2d 1930); *Redman vs. United*

States, 176 Fed. 2d 713, 715 (C. A. 2d C. 1949); *Redman vs. United Fruit Co.*, 185 Fed. 2d 553 (C. A. 2d C. 1950).

Redman vs. United Fruit Co., which appears to be the latest reported expression of the Court of Appeals for the Second Circuit on this point, holds in effect that before a court in admiralty may refuse to follow the local statute of limitations, libelant's evidence must clearly rebut the presumption of detriment to respondent which results from libelant's delay.

It is respectfully submitted that the foregoing analysis clearly demonstrates that the pertinent decisions of the Court of Appeals for the Second Circuit are in complete accord with the decisions of the Court of Appeals for the Fifth Circuit, and, more particularly, with the decision of the Court of Appeals in the case at bar.

Conclusion

By way of summary of the principal points made in this brief, it is submitted that the above citations of authority, argument, and analysis demonstrate unmistakably that the decision of the Court of Appeals for the Second Circuit in *Lincoln vs. Cunard S. S. Co.*, stated by Petitioner to be in conflict with the decision in the case at bar, is, on the contrary, entirely in harmony therewith, and that, further, available pertinent decisions of the Court of Appeals for the Second Circuit, which Petitioner has chosen to ignore, indicate clearly that the decisions of the Court of Appeals for the Second Circuit pertinent to the questions involved in the case at bar, are entirely harmonious and consistent therewith.

WHEREFORE, Respondent prays that the petition for review on writ of certiorari be denied and that the

costs of this brief be added to the costs heretofore taxed against Petitioner and in favor of this Respondent in the Court of Appeals.

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